

One Arden Partners, L.P. v Bicher
2021 NY Slip Op 30232(U)
January 26, 2021
Supreme Court, New York County
Docket Number: 152705/2020
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12

Justice

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ONE ARDEN PARTNERS, L.P.,

Plaintiff,

- v -

KONRAD BICHER,

Defendant.

-----X

INDEX NO. 152705/2020

MOTION DATE _____

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2-12, 14, 33-51 were read on this motion for preliminary injunction/TRO.

By order to show cause filed on March 12, 2020 (NYSCEF 2), plaintiff, owner and landlord of the building at One Arden Street, the premises at issue, moves for an order enjoining and restraining defendant, its tenant, from using the premises illegally and/or improperly as a residence for transient guests, from advertising or listing the apartment for short-term rentals, and from using the premises from anything other than as a residential apartment and his own primary residence. Plaintiff was directed to serve defendant with the OSC along with the summons and complaint by personal in-hand delivery on or before March 20, 2020. (NYSCEF 12).

On May 26, 2020, plaintiff's motion was denied and the action was dismissed based on plaintiff's failure to file proof of service of the OSC and pleadings. (NYSCEF 14). On October 6, 2020, the May 2020 decision was vacated as plaintiff had by then submitted proof of service and denied having intended to abandon the action. The OSC and action were thus restored, and defendant was given a chance to oppose the OSC. (NYSCEF 30).

On October 28, 2020, defendant filed a cross motion to dismiss, seeking an order denying the injunction and dismissing the action based on plaintiff's failure to serve him properly.

(NYSCEF 33). Plaintiff opposes the cross motion.

I. MOTION TO DISMISS

In its summons and complaint, plaintiff alleges as pertinent here, that defendant: is not using the premises as his primary residence, pays rent with checks bearing the address 70 Patricia Lane, Clinton Corners, New York 12514, and uses an alternate address, 240 West 64th Street, apt. 4D, New York 10025, which is associated with BMB Rentals LLC. (NYSCEF 1).

Plaintiff's process server attests that he served defendant with the OSC and pleadings as follows:

- (1) On March 16, 2020 at 2:35pm at One Arden Street, apt. 505, in Manhattan, he rang defendant's doorbell, knocked on the door, waited approximately two minutes, and left when no one answered;
- (2) On March 17, 2020 at 1:24pm. and again at 6:22pm, at the same location, he again unsuccessfully rang defendant's doorbell, knocked on the door, and then left;
- (3) On March 18, 2020 at 3:47pm at the same location, he again unsuccessfully rang defendant's doorbell, knocked on the door, and then left; and
- (4) On March 19, 2020 at 4:05pm at the same location, he again unsuccessfully rang defendant's doorbell and knocked on the door. When no one answered, the server affixed the papers to the door, and later that day mailed a copy of the papers to defendant.

(NYSCEF 23).

A. Contentions

In defendant's affidavit in support of his motion to dismiss, he denies receiving a copy of the papers and alleges that service was improper absent an attempt to ascertain his business address or any other address before resorting to nail and mail service. (NYSCEF 34). He submits a copy of a sublease reflecting that during the relevant time period, he sublet the premises to another person (*id.*), and observes that plaintiff, in its complaint and papers supporting the OSC, alleges not only that defendant does not use the One Arden Street premises as his primary residence but also that he has two other addresses at which he allegedly resides. Thus, as it was aware that defendant does not reside at the premises, it could have served him at an alternative address of which it had notice, but did not do so. Defendant thus argues that plaintiff failed to exercise due diligence in attempting to serve him. (NYSCEF 37).

Plaintiff denies that it had written or actual notice of defendant's whereabouts other than at the subject apartment (NYSCEF 43), and observes that in an email dated August 20, 2020, defendant stated that the Arden Street premises is his home and that he lives there. (NYSCEF 47). Plaintiff also claims that it made sufficient attempts to serve defendant at the premises before affixing and mailing the papers to him. (NYSCEF 43).

B. Analysis

Pursuant to CPLR 308(4), if service on a person cannot be made by due diligence by personal, in-hand delivery or by delivery to a person of suitable age and discretion, then it may be effected by affixing the pleadings to the person's actual dwelling place or usual place of abode and mailing to his or her last known residence.

While plaintiff denies having notice of alternative addresses for defendant, its own summons and complaint and the papers supporting the application for an OSC contain at least

two other addresses, along with the allegation that defendant does not reside primarily at the Arden Street premises. It is thus clear that plaintiff had notice and knowledge that defendant may not be residing at the Arden Street premises and that instead may be residing at one of the other two addresses about which it was aware.

As the essence of this action is the contention that defendant does not live at the premises but illegally rents it out to transient guests, plaintiff seeks to have it both ways, alleging that defendant resides at the premises to show that it served him properly there, while also alleging that he does not reside there in order to enjoin him from renting it out to others. That defendant asserted in an August 2020 email that the premises is his home and he lives there is irrelevant as it was sent months after plaintiff's attempted service on him.

Given plaintiff's stated belief that defendant did not reside at the premises, its attempted service on defendant there, without attempting to serve him at his other addresses or conducting a search for his place of employment, does not evidence due diligence. (*See e.g. Serraro v Staropoli*, 94 AD3d 1083 [2d Dept 2012] [due diligence requires showing that process server made genuine inquiries about defendant's whereabouts and place of employment; server never asked about defendant's work schedules or business addresses, and despite fact that plaintiff knew one defendant owned and worked at place one mile from residence, server never tried to serve him there]; *Spath v Zack*, 36 AD3d 410 [1st Dept 2007] [due diligence not shown absent indication that process server inquired into defendant's whereabouts or place of business]).

Plaintiff's knowledge of defendant's other addresses and its ability to serve him at either or both is also demonstrated by the successful in-hand delivery to defendant of its second order to show cause (mot. seq. two) at the 64th Street address. (NYSCEF 29). While plaintiff also attempted to serve the motion at the Arden Street premises, the process server was unable to do

so as the person who answered the door told the server that he was defendant's subtenant and that defendant did not live there. (NYSCEF 28).

Moreover, all of the service attempts were made during weekdays and at times when one may be expected to be at work or commuting to and from work. (*Serraro*, 94 AD3d at 1085 [all service attempts made during weekdays and during hours when reasonably expected that defendants would be at, or in transit to and from, work]; *Spath*, 36 AD3d at 413 [no service attempts made on weekend]).

Defendant thus demonstrates that plaintiff did not serve him properly, and that, therefore, there is no personal jurisdiction over him here. In light of this result, plaintiff's motion for an injunction is not considered.

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant's motion to dismiss (mot. seq. two) is granted, and the complaint is dismissed in its entirety; it is further

ORDERED, that plaintiff's motion for a preliminary injunction (mot. seq. two) is denied as academic; and it is further

ORDERED, that the clerk is directed to enter judgment accordingly.

1/26/2021

DATE

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BARBARA JAFFE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE